MOTION FILED
SEP 11 1992

(13)

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,
v.
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENT

GERALD M. FEDER
DAVID R. LEVIN *
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Suite 600
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans (the "NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to affirm the decision below, upholding the constitutionality of the statutory, rebuttable presumption of correctness in favor of plan trustees and plan actuaries, in calculating multiemployer plan withdrawal liability.

The Respondent has consented to the filing of this brief; the Petitioner has not.

The NCCMP is a tax-exempt, nonprofit corporation organized to represent the interests of the more than nine million workers who participate in collectively bargained multiemployer plans. The NCCMP's affiliates include over 240 multiemployer plans and related international unions. Its affiliates together represent the great majority of the participants in multiemployer plans.[1] The NCCMP actively participated throughout the development and congressional consideration of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). *See Connolly v. PBGC*, 475 U.S. 211, 215 n.1 (1986). The NCCMP has been recognized as having had a "significant impact" on the 1980 Amendments by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed., July 24, 1980) and S10100 (daily ed., July 29, 1980). A reversal of the decision below will have an adverse impact on all multiemployer plans and, therefore, will be particularly adverse to the interest of NCCMP affiliates, which represent the majority of participants in multiemployer plans.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans.

We are concerned that a reversal of the decision below would disrupt severely the operation of multiemployer plans, mire the withdrawal liability determination process with frivolous challenges, frustrate the collection of appropriate amounts of withdrawal liability, and, consequently, undermine the financial stability of multiemployer plans and the millions of workers who look to these plans for pension benefits. Therefore, we respectfully request that this Court affirm the decision below.

Based on the foregoing, the NCCMP respectfully moves for leave to file the accompanying brief *amicus curiae*.

[1] The Respondent is affiliated with the NCCMP.

GERALD M. FEDER
DAVID R. LEVIN *
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

Dated: September 1992

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS	1
SUMMARY OF REASONS FOR AFFIRMANCE	3
REASONS FOR AFFIRMANCE	6
I. THE INITIAL ADJUDICATION TO RESOLVE DISPUTES OVER WITHDRAWAL LIABILITY IS CONDUCTED BY AN IMPARTIAL ARBITRATOR, NOT BY PLAN TRUSTEES	6
II. THE REBUTTABLE PRESUMPTION OF CORRECTNESS, APPLICABLE TO WITHDRAWAL LIABILITY DETERMINATIONS MADE BY PLAN TRUSTEES, IS A RATIONAL CONGRESSIONAL RESPONSE TO PROMOTE THE FINANCIAL STABILITY OF MULTIEMPLOYER PLANS	13
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

Berkshire Hathaway v. Textile Workers Pension Fund, 874 F.2d 53 (1st Cir. 1989) 7
Board of Trustees, Michigan United Food & Commercial Workers v. Eberhard Foods, 831 F.2d 1258 (6th Cir. 1987) 16
Board of Trustees v. Thompson Building Materials, Inc., 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) .....
Combs v. Classic Coal Corp., 931 F.2d 96 (D.C. Cir. 1991) 2, 18
Connolly v. PBGC, 475 U.S. 211 (1986) 4, 5, 6, 13
Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund, 578 F. Supp. 1222 (D.D.C. 1984), *aff'd*, 753 F.2d 166 (D.C. Cir. 1985) 10
Gibson v. Berryhill, 411 U.S. 564 (1973) 12
Huber v. Casablanca Industries, Inc., 916 F.2d 85 (3d Cir. 1990) 9, 18
Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983) 11
Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, 762 F.2d 1137 (1st Cir. 1985) (*en banc*) 2, 4, 9, 13, 16
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 5, 12, 13
Masters, Mates & Pilots Pension Plan v. USX Corp., 900 F.2d 727 (4th Cir. 1990) 16, 18
Mobile, J. & K.C.R. v. Turnipseed, 219 U.S. 35 (1910) 5, 13, 14
Morrissey v. Brewer, 408 U.S. 471 (1972) 19
Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 466 U.S. 359 (1980) 13
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 13
PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) 4, 6
Republic Industries, Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984) 2, 16
Schweiker v. McClure, 456 U.S. 188 (1982) 9, 10, 12
Stewart v. National Shopmen Pension Fund, 730 F.2d 1552 (D.C. Cir. 1984) 7

TABLE OF AUTHORITIES—Continued

Page

Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers International*, 467 U.S. 1259 (1984) 2
Tumey v. Ohio, 273 U.S. 510 (1927) 12
United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986), *aff'd sub nom. by equally divided vote, PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987) 2, 16
United States v. Gainey, 380 U.S. 63 (1965) 18
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 18
Ward v. Village of Monroeville, 409 U.S. 57 (1972) 12
Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984) 2
Weinberger v. Salfi, 422 U.S. 749 (1975) 5, 18

Arbitrations:

Buy-Low, Inc. and Trustees, Food Workers Pension Fund, 5 Employee Benefits Cas. (BNA) 2641 (1984) (Bowles, Arb.) 17
Carnation Co. and Central States Pension Fund, 9 Employee Benefits Cas. (BNA) 1409 (1988) (Nagle, Arb.) 17
Eberhard Foods, Inc. and RSEU Joint Pension Fund, 6 Employee Benefits Cas. (BNA) 1961 (1985) (Glover, Arb.) 17
Hankin Transportation Personnel, Inc. and Teamsters 641 Pension Fund, 14 Employee Benefits Cas. (BNA) 2852 (1991) (Pereles, Arb.) 17
Herman Segall, Inc. and ILGWU Retirement Fund, 3 Employee Benefits Cas. (BNA) 2449 (1982) (Pillsbury, Arb.) 17

TABLE OF AUTHORITIES—Continued

	Page
ITU Pension Plan and Ft. Worth Star Telegram, 5 Employee Benefits Cas. (BNA) 1193 (1984) (Mittelman, Arb.)	17
Perkins Trucking Co. and Local 807 Pension Fund, 4 Employee Benefits Cas. (BNA) 1489 (1983) (O'Loughlin, Arb.)	17
PMTA-ILA Pension Fund and E.W. Coslett & Sons, Inc., 6 Employee Benefits Cas. (BNA) 2705 (1985) (Jaffee, Arb.)	17
Underground Construction Co. and Carpenters Pension Trust Fund for Northern California, 14 Employee Benefits Cas. (BNA) 1543 (1991) (Twohey, Arb.)	17
Federal Statutes:	
ERISA Section 4221(a)(3)	1
29 U.S.C. § 1002(16)(A)(ii)	4, 6, 10
29 U.S.C. § 1002(16)(B)(iii)	4, 6, 10
29 U.S.C. § 1082(c)	10
29 U.S.C. § 1132(g)(2)	10
29 U.S.C. § 1241	7
29 U.S.C. § 1342(d)(1)(B)(ii)	11
29 U.S.C. § 1391	4
29 U.S.C. § 1391(b)	4, 6, 10
29 U.S.C. § 1391(c)	7
29 U.S.C. § 1391(c)(2)	4, 6, 10
29 U.S.C. § 1391(c)(3)	4, 6, 10
29 U.S.C. § 1391(c)(4)	4, 6, 10
29 U.S.C. § 1393(a)	7
29 U.S.C. § 1394(a)	7
29 U.S.C. § 1394(b)	4, 7
29 U.S.C. § 1399(b)(2)(A)(i)	8
29 U.S.C. § 1399(b)(2)(A)(iii)	8
29 U.S.C. § 1399(b)(2)(B)	8
29 U.S.C. § 1401	11
29 U.S.C. § 1401(a)(2)	4, 5, 8, 11
29 U.S.C. § 1401(a)(3)	2
29 U.S.C. § 1401(a)(3)(A)	4, 8
29 U.S.C. § 1401(a)(3)(B)	2, 9, 10

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 1401(b)(2)	5, 9, 17
29 U.S.C. § 1401(c)	17
Legislative Materials:	
H.R. Rep. No. 96-869, 96th Cong., 2d Sess. (1980)	9, 14
H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974)	15
S. Rep. No. 383, 93d Cong., 2d Sess. (1974)	15
Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* (1980)	5, 14
Administrative Materials:	
20 C.F.R. § 901.20	7
20 C.F.R. § 901.31	7
29 C.F.R. § 2641	11
29 C.F.R. § 2641.3	11
29 C.F.R. § 2641.3(b)	11
29 C.F.R. § 2641.3(c)	11
Comptroller General of the United States, GAO/HRD-85-16, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (1985)	8
Miscellaneous:	
D. McGill, *Fundamentals of Private Pensions* (3d ed. 1975)	8
2 *Scott on Trusts* § 177 (3d ed. 1967)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENT

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief *amicus curiae* in support of Respondent Construction Laborers Pension Trust for Southern California.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief.

The Petitioner in the instant case challenges the constitutionality of Section 4221(a)(3) of the Employee

Retirement Income Security Act ("ERISA") as amended by MPPAA, 29 U.S.C. § 1401(a)(3). That statutory Section provides that the determination of an employer's withdrawal liability by multiemployer plan trustees is presumed to be correct, unless the employer shows, by a preponderance of the evidence presented to an impartial arbitrator, that the trustees' determination is unreasonable or clearly erroneous. Every circuit court to address the issue, with one exception, has held that the rebuttable presumption of correctness in favor of the trustees meets constitutional muster.[1] That statutory section also provides that the actuarial assumptions and methods used in determining the plan's unfunded vested benefits are presumed correct, unless the employer shows, by a preponderance of the evidence presented to an impartial arbitrator, either that the actuarial assumptions and methods "were, in the aggregate, unreasonable" or that the plan's actuary made a "significant error" in applying the assumptions or the methods, 29 U.S.C. § 1401(a)(3)(B). No circuit court has found that this rebuttable presumption of actuarial correctness is constitutionally deficient.

The existing multiemployer plan rules, enacted under MPPAA in 1980, have been successful in facilitating

---

[1] *See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (*en banc*); *Board of Trustees v. Thompson Building Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers International*, 467 U.S. 1259 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984). The one exception was *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd sub nom. by equally divided vote, PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

sound funding of multiemployer plans. These plans are currently well-funded, on the whole, as is the government's multiemployer pension plan guaranty program administered by the Pension Benefit Guaranty Corporation ("PBGC"). In the twelve years since the enactment of MPPAA, multiemployer plan funding levels have risen dramatically. The most recent available information reveals that over 95 percent of these plans are more than 80 percent funded for vested benefit liabilities. Currently, the PBGC's multiemployer plan guaranty program is so well-funded that the PBGC recently proposed an increase in the program's guarantees, without an increase in premiums. The financial problems that have plagued the single-employer pension plan insurance program under Title IV of ERISA simply do not exist in the multiemployer program. The multiemployer insurance program is, in fact, overfunded with the current $2.60 per participant annual premium, in sharp contrast to the single employer insurance program, which is underfunded even with the current $53.00 per participant annual premium.

It is our belief that this legislation, including the provision challenged here, is essential to the viability of the federal pension benefit guaranty program established by MPPAA and contained in Title IV of ERISA. If the decision below is reversed, we are concerned that the result will be to disrupt severely the operation of multiemployer pension plans, to frustrate the collection of appropriate amounts of withdrawal liability, and, thereby, to endanger the retirement security of millions of American workers who participate in these pension plans. Therefore, the NCCMP submits this brief, urging affirmance of the decision below.

SUMMARY OF REASONS FOR AFFIRMANCE

A. This Court has upheld the constitutionality of the imposition of withdrawal liability as a rational congressional response to the need for safeguarding the

solvency of multiemployer pension plans. *Connolly v. PBGC*, 475 U.S. 211 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). Multiemployer plan administrators—*i.e.*, each plan's joint board of labor and management trustees, 29 U.S.C. §§ 1002(16)(A)(ii) and (16)(B)(iii)—determines the amount of an employer's withdrawal liability using one of four statutorily mandated methods of calculation. 29 U.S.C. §§ 1391(b), (c)(2), (c)(3), and (c)(4). MPPAA requires that the trustees uniformly apply the chosen method of calculation to all withdrawing employers. 29 U.S.C. § 1394(b). The determination of withdrawal liability involves the use of complex actuarial assumptions, 29 U.S.C. § 1391, so the trustees must rely on the expertise of the plan's actuary. In the event of a dispute over a withdrawal liability determination, the employer or the trustees may initiate arbitration in accordance with "fair and equitable procedures" promulgated by the PBGC, 29 U.S.C. § 1401(a)(2). In the arbitration proceeding, the trustees' determination of withdrawal liability and the actuary's calculation of unfunded vested benefits are presumed correct, 29 U.S.C. § 1401(a)(3)(A); however, the presumptions are rebuttable, *id.*

The Petitioner asserts that trustees, in making withdrawal liability determinations, play an adjudicatory role. They also assert that trustees have an inherent bias to maximize the calculation of withdrawal liability, thereby denying employers their due process right to an impartial adjudicator. To the contrary, all but one of the circuit courts to address this issue have held that the trustees' determination of withdrawal liability is a matter of general plan administration, not adjudication. *See, e.g., Keith Fulton & Sons, Inc. v. New England Teamsters and Tracking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (*en banc*). This administrative determination of the trustees is subject to review by impartial adjudicators: first, by an arbitrator chosen by the employer and the trustees, and then, by the federal judi-

ciary. 29 U.S.C. §§ 1401(a) and (b)(2). The MPPAA arbitration process and the availability of judicial review are consistent with this Court's "powerful and independent constitutional interest in fair adjudicative procedure." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980).

B. To correct what it perceives as a trustee and actuarial bias against withdrawing employers, the Petitioner asks this Court to strike down as unconstitutional the rebuttable presumption that the trustees' determination of withdrawal liability and the actuary's determination of unfunded vested benefits are correct. However, this Court has long upheld the constitutionality not only of rebuttable presumptions, *Mobile, J. & K.C.R. v. Turnipseed*, 219 U.S. 35 (1910), but also of irrebuttable presumptions, *Weinberger v. Salfi*, 422 U.S. 749 (1975).

Given the congressionally articulated need to preserve multiemployer pension plans and safeguard their solvency, *Connolly*, 475 U.S. at 227-28, the rebuttable presumption of correctness is a rational means to promote uniformity in the calculation of withdrawal liability and to discourage dilatory tactics by withdrawing employers—"tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (1980). Moreover, as a practical matter, employers have successfully rebutted the presumption in a substantial number of the reported MPPAA arbitration cases, and arbitrators have, consequently, reversed or substantially modified trustee withdrawal determinations. *See* cases cited *infra* note 12. The rebuttable presumption of correctness accorded the trustees' determination of withdrawal liability and the actuary's calculation of unfunded vested benefits, in no manner precludes any party to the dispute from a full hearing by neutral adjudicators consistent with the dictates of due process.

REASONS FOR AFFIRMANCE

I. THE INITIAL ADJUDICATION TO RESOLVE DISPUTES OVER WITHDRAWAL LIABILITY IS CONDUCTED BY AN IMPARTIAL ARBITRATOR, NOT BY PLAN TRUSTEES.

This Court is intimately familiar with the impetus giving rise to the enactment of MPPAA. *Connolly v. PBGC*, 475 U.S. 211, 213-18 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-23 (1984). In upholding the constitutionality of the statute, this Court summarized the rationale for MPPAA:

> Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans.

Connolly, 475 U.S. 227-28.

When an employer withdraws from participation in a multiemployer pension plan, MPPAA requires that the employer pay to the plan "the employer's proportionate share of the plan's 'unfunded vested benefits', calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *R.A. Gray*, 467 U.S. at 725. The plan administrator—who, in the case of multiemployer plans, is the joint board of labor and management trustees, 29 U.S.C. §§ 1002 (16)(A)(ii) and (16)(B)(iii)—must use the "presumptive" method for calculating the employer's liability, 29 U.S.C. § 1391(b), unless the plan has been amended to permit the calculation of withdrawal liability using one of three alternative methods, 29 U.S.C. §§ 1391(c)(2), (3), or (4).[2]

[2] None of these methods precisely determine the allocable unfunded vested benefits for an individual employer in relation solely to its own employees. Congress did not seek to make each withdrawing employer liable solely for the unfunded vested benefits of its own employees. Rather, Congress chose to make each employer liable for a share of the unfunded vested benefits of the plan as a whole. Thus, each withdrawing employer pays for the unfunded vested benefits of employee-participants which are not necessarily its own. Likewise, when a withdrawing employer does not contribute enough to satisfy its share of the unfunded vested benefits of the plan, or does not contribute a share commensurate with the vested benefits earned by its employee-participants, the employers that remain in the plan cover the cost of those benefits, either through increased contributions or through increased withdrawal liability. *See Berkshire Hathaway v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n.2 (1st Cir. 1989); *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1554 n.4 (D.C. Cir. 1984).

Thus, the selection of a method to calculate withdrawal liability is a general plan administrative matter performed by the plan's administrator, *i.e.*, the trustees. Moreover, once an allocation method has been selected for the plan, either by operation of law or by amendment under 29 U.S.C. § 1391(c), MPPAA requires that the method of calculation be uniformly applicable to all withdrawing employers. 29 U.S.C. § 1394(b).[3]

All of the withdrawal liability calculation methods require the use of certain actuarial assumptions, which must be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. § 1393(a).[4] Consequently trustees must rely heavily, if not exclusively, on the expertise of the plan's actuary

[3] In addition, no plan rule or amendment under 29 U.S.C. § 1391(c) "may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted." 29 U.S.C. § 1394(a).

[4] Pursuant to 29 U.S.C. § 1241, the Secretaries of Labor and the Treasury established a Joint Board for the Enrollment of Actuaries. This Joint Board has promulgated regulations which prescribe standards of performance for actuarial services, 20 C.F.R. § 901.20, and penalties for failure to adhere to these standards, 20 C.F.R. § 901.31.

to determine a reasonable interest rate and other assumptions necessary to make the withdrawal liability calculations.[5] *See* Comptroller General of the United States, GAO HRD-85-16, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (1985).

Once the trustees notify the employer of the amount of its withdrawal liability, the employer may request the trustees to review "any specific matter relating to the determination of the employer's liability," 29 U.S.C. § 1399(b)(2)(A)(i), based on any additional relevant information supplied by the employer. 29 U.S.C. § 1399(b)(2)(A)(iii). "After a reasonable review" by the trustees, 29 U.S.C. § 1399(b)(2)(B), if there remains a dispute between the employer and the trustees, either party may initiate arbitration "in accordance with fair and equitable procedures to be promulgated by the [Pension Benefit Guaranty C]orporation." 29 U.S.C. § 1401(a)(2).

In the arbitration proceeding, the trustees' determination of withdrawal liability is presumed correct unless the employer shows "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Also, in the arbitration proceeding, the actuary's determination of the plan's unfunded vested benefits is presumed correct, unless the employer shows "by a preponderance of the evidence that (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." 29 U.S.C. § 1401(a)(3)(B). Lastly, either the employer or the trustees may file an action in federal district court to "enforce, vacate, or modify" the arbitrator's decision. 29 U.S.C. § 1401(b)(2).

[5] Because of the sensitivity of the cost estimates to the interest assumption, the rate must be chosen with great care. "The rate should represent the expected rate of return on plan assets over the long term. It should not be changed to reflect fluctuations in the final market that appear to be transitory or of short-term duration." D. McGill, *Fundamentals of Private Pensions* at 325 (3d ed. 1975).

The Petitioner asserts that, with respect to the withdrawal liability determination procedures, trustees function as adjudicators. The Petitioner also baldly asserts that trustees and plan actuaries have an inherent bias to maximize assessments of withdrawal liability, which results in the denial of withdrawing employers' due process right to an impartial adjudicator.[6]

However, trustees do not play an adjudicatory role. Rather, they "are simply part of an administrative procedure set up by Congress for reaching an initial determination of withdrawal liability which is then challengeable in arbitration and in court." *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1140 (1st Cir. 1985) (*en banc*). And, if the trustees are not adjudicators, they cannot be biased adjudicators.[7]

[6] With respect to conclusory statements about untempered trustee and actuarial bias, we note that assertions of bias "require substantiation before they can provide a foundation for invalidating an Act of Congress." *Schweiker v. McClure*, 456 U.S. 188, 196 n.10 (1982).

[7] The Petitioner and its *amici* have tried to transmogrify the plan trustees' fulfillment of their fiduciary duty to collect money owed the trust into a manifestation of bias. In response, we note that in H.R. Rep. 96-869, 96th Cong., 2d Sess. 67 (1980), the Congress made "it clear that the trustees' role is not simply to find the highest value for withdrawal liability; they would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation." *Keith Fulton*, 762 F.2d at 1142-43. *But see Yahn*; *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 93 (3d Cir. 1990) (holding that "trustee bias in favor of the fund carries over to an actuary selected and paid by the trustees").

Trustees are, by definition, the plan's "administrator," 29 U.S.C. § 1002(16)(A)(ii) and (16)(B)(iii). Consequently, their role "is one of administration or enforcement rather than adjudication." *Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund*, 578 F. Supp. 1222, 1237, (D.D.C. 1984), *aff'd*, 753 F.2d 166 (D.C. Cir. 1985). Certainly, the initial determination of the amount of withdrawal liability is made by the trustees, based on calculations performed and decisions made by the plan's actuary.[8] Yet, making a determination concerning an obligation to pay money no more converts a trustee—let alone, a plan actuary—into an adjudicator than does a trustee decision to collect delinquent contributions and assess liquidated damages, *see* 29 U.S.C. § 1132(g)(2), or an actuary's selection of a funding method or assumptions, 29 U.S.C. § 1082(c).

Due process does not demand impartiality on the part of every decision maker. Rather, "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," *Schweiker v. McClure*, 456 U.S. at 195. The inherent trustee right to calculate and collect amounts owed the trust has not been found to convert a trustee into an adjudicator. This independent right of trustees is a fundamental prerequisite to the discharge of all fiduciary duties found at common law; all such duties that are detailed in ERISA; and those fiduciary duties that have been interpreted by the federal ju-

[8] For example, the plan's actuary calculates the value of the plan's unfunded vested benefits. This critical calculation—which is the basis for determining an employer's liability under any method permitted under ERISA, 29 U.S.C. §§ 1391(b) and 1391(c)(2), (3), and (4)—is presumed correct, unless an employer demonstrates by a preponderance of the evidence that the actuarial assumptions and methods "were, in the aggregate, unreasonable" or that the plan actuary "made a significant error in applying the actuarial assumptions or methods," 29 U.S.C. § 1401(a)(3)(B). Even the *Yahn* court did not declare this presumption to be unconstitutional, even though it found the presumption of correctness of trustee decisions to be unconstitutional.

diciary. *See, e.g.*, 2 *Scott on Trusts* § 177 (3d ed. 1967); *Jim McNeff Inc. v. Todd*, 461 U.S. 260 (1983); 29 U.S.C. §§ 1132(g)(2), 1342(d)(1)(B)(ii).

It is only after the trustees make their determination of liability that MPPAA provides for the "Resolution of Disputes," 29 U.S.C. § 1401. This adjudicatory stage of dispute resolution, to which a due process analysis is appropriately applied, begins with the arbitration proceeding prescribed at 29 U.S.C. § 1401.

The arbitration proceeding required by MPPAA must be conducted according to "fair and equitable procedures" established by the PBGC. 29 U.S.C. § 1401(a)(2). The arbitration procedures, which were finally promulgated by the PBGC in August 1985 after several years of careful review, painstakingly assure that both the withdrawing employer and the plan trustees are full and equal participants in the selection of the arbitrator. 29 C.F.R. § 2641.3.

To ensure complete impartiality, an arbitrator must disclose any bias or interest in the outcome of the arbitration which should result in the arbitrator's disqualification and withdrawal, 29 C.F.R. § 2641.3(b). Moreover, at any time before the final award is made, any party may challenge the arbitrator's impartiality and seek his/her withdrawal, 29 C.F.R. § 2641.3(c). Additionally, the PBGC-mandated procedures provide for prehearing discovery; the presentation of a wide array of evidence; maintaining a record and transcript of the proceedings; submission of written briefs; calling of witnesses, including expert witnesses; preparation of written findings of fact and conclusions of law by the arbitrator; and reopening the proceedings. 29 C.F.R. § 2641.

In addition to its promulgated arbitration rules, the PBGC has formally approved alternative procedures sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association ("AAA"). These AAA rules have been used

by multiemployer plan trustees and withdrawing employers since their initial formulation and publication in June 1981. Like the PBGC procedures, they are comprehensive and ensure complete arbitral fairness and impartiality.[9]

As this Court repeatedly has recognized, there is a presumption that an adjudicator is unbiased and "the burden of establishing a disqualifying interest rests on the party making the assertion." *Schweiker v. McClure*, 456 U.S. at 196. Our research has revealed no withdrawal liability case where there has been even a suggestion that the procedure for the selection of the arbitrator or the rules governing the conduct of the arbitration proceeding are unfair.

A fundamental part of due process requires that no person will be deprived of his right to "a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico Inc.*, 446 U.S. 238, 242 (1980). Yet, there has been no showing of arbitral predisposition in this case. The situation here is unlike *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Tumey v. Ohio*, 273 U.S. 510 (1927), or *Gibson v. Berryhill*, 411 U.S. 564 (1973), where the adjudicators had a clear interest in the outcome of the dispute. No attack has been made, in this or any other MPPAA case, on the impartiality or fairness of the arbitrator, the statutory and PBGC-promulgated arbitration procedures, or the judicial review of the arbitration.

The arbitrator selection process, the arbitration procedures mandated and approved by the PBGC, and the

[9] For example, Section 11 of the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes provides that the AAA shall submit a list of proposed expert arbitrators to each party, and each party shall then engage in a numerical ordering of arbitrator preference which is designed to result in an acceptable, mutual choice. If the parties cannot agree on any proposed arbitrator, the AAA shall make the choice.

availability of federal court review of arbitration decisions are fully consistent with this Court's "powerful and independent constitutional interest in fair adjudicative procedure." *Jerrico*, 446 U.S. at 243.

II. THE REBUTTABLE PRESUMPTION OF CORRECTNESS, APPLICABLE TO WITHDRAWAL LIABILITY DETERMINATIONS MADE BY PLAN TRUSTEES, IS A RATIONAL CONGRESSIONAL RESPONSE TO PROMOTE THE FINANCIAL STABILITY OF MULTIEMPLOYER PLANS.

Given the congressionally articulated need to preserve multiemployer pension plans and safeguard their solvency, *Connolly*, 475 U.S. at 227-28, and the congressional intent to impose liability "only to the extent necessary to achieve the legislative purpose," *Nachman Corp. v. PBGC*, 592 F.2d 947, 962 (7th Cir. 1979), *aff'd*, 466 U.S. 359 (1980), "it is not irrational for Congress to impose presumptions as a disincentive to challenging the trustees' determination precisely because . . . there is a range of 'reasonable' withdrawal liability amounts." *Keith Fulton*, 762 F.2d at 1143. And, when Congress creates a statutory right—*e.g.*, a plan's claim for withdrawal liability—Congress "clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof. . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982).

This Court long ago acknowledged that "[t]he law of evidence is full of presumptions either of fact or law." *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 42 (1910). Further, this Court has consistently held that due process is not jeopardized if there is a "rational connection between the fact proved and the ultimate fact presumed" and that

> [i]f a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his

> defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

Turnipseed, 219 U.S. at 43.

In the multiemployer plan withdrawal liability setting, the "facts proved" compromise the application of the rules for withdrawal liability determination set forth in ERISA at 29 U.S.C. §§ 1381 through 1399. The "facts presumed" are that trustees correctly apply these withdrawal liability rules to calculate the amount of liability and that plan actuaries correctly select and apply actuarial assumptions and methods that are reasonable in the aggregate. The rational basis for the presumption was articulated by the Senate Committee on Labor and Human Resources:

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct' approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan.

Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 20-21 (1980).[10]

The deference accorded the plan's actuary under the withdrawal liability calculation and assessment process is reflective of an established congressional intent that

---

[10] *See* H.R. Reg. No. 96-869, 96th Cong., 2d Sess. 86 (1980):

> These rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligations by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination.

the assumptions of the plan's actuary will not be challenged—not even by the Internal Revenue Service—unless they are "substantially unreasonable":

> [P]lan liabilities must be determined on the basis of actuarial assumptions that, in the aggregate, are reasonable. [The House Ways and Means C]ommittee recognizes that frequently there is a range of actuarial assumptions which may be appropriate for determining the costs of a defined benefit pension plan, and the choice of the appropriate assumptions is very much a matter of judgment.
>
> Since the actuarial assumptions used must be reasonable in the aggregate, it is anticipated that on audit, the Internal Revenue Service will (as presently) require a change of assumptions where they do not meet this standard. *However, unless the assumptions used are substantially unreasonable, it is contemplated that generally the Service will not require a change of assumptions to be made effective for years prior to the year in which the audit is made.*

H.R. Rep. No. 807, 93d Cong., 2d Sess. at 95 (1974) (emphasis supplied).

The Congress also stressed that "frequently there is a range of actuarial assumptions which may be appropriate for determining the costs of a defined benefit pension plan, and the choice of the appropriate assumption is a matter of judgment. In this circumstance, [the plan sponsor] may attempt to substitute [the plan sponsor's] judgment for that of [the plan's] actuary, which may lead to situations where plan costs are not being independently determined by an actuary. The committee believes that it is inappropriate for [the plan sponsor] to substitute [the plan sponsor's] judgment in these matters for that of a qualified actuary. . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. at 95 (1974); S. Rep. No. 383, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4890, 4954.

The "judgment" is to be that of the plan's actuary. In the Fourth Circuit's decision in *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 734 (4th Cir. 1990), the court highlighted the fallacy of second-guessing a plan actuary and, in so doing, the court rejected an argument that an actuary must select an interest rate which is at least as high as that available from United States Treasury securities:

> The current level of the risk-free rate might be relevant in determining what range of interest rates will likely be earned within a certain time frame; but its existence cannot be considered a floor for valuing benefits, or else, pension plans would be forced to invest in only government securities since they could not chance holding a riskier portfolio and producing less than the riskless rate of return. Investing's customary component of prudent risk taking is nowhere outlawed in the relevant statutory provisions.

See Board of Trustees, Michigan United Food & Commercial Workers v. Eberhard Foods, 831 F.2d 1258, 1262-63 (6th Cir. 1987) (also rejecting T-bill rate argument).

Given these ranges of reasonableness and the complexities of the withdrawal liability determinations, even in the sole appellate court decision, finding that the rebuttable presumptions in favor of the trustees are unconstitutional, that court could "not deny the *Keith Fulton* court's view that the presumptions are [a] rational means of promoting uniformity and discouraging litigation." *Yahn & McDonnell*, 787 F.2d at 141. *See Keith Fulton*, 762 F.2d at 1144-45.

Furthermore, under MPPAA, the presumptions of correctness are rebuttable. The provisions in question do "little more than allocate the burden of proof to the challenger and direct that issues which are close be resolved in favor of" the plan trustees. *Republic Industries*, 718 F.2d at 641. As one arbitrator put it, in resolving a withdrawal liability dispute, the presumption should be interpreted as a device "to avoid procedural process problems." *Eberhard Foods, Inc., and RSEU Joint Pension Fund*, 6 Employee Benefits Cas. (BNA) 1961, 1966 (1985) (Glover, Arb.). The presumption is not to be viewed as "a 'per se' rule in favor of the Fund" or an "impenetrable 'safe harbor'. . . ." *Id.* Moreover, as a practical matter, arbitrators have not hesitated to rule that trustee withdrawal liability determinations have been unreasonable or erroneous. Indeed, in a significant number of the reported MPPAA withdrawal liability arbitration cases, employers have successfully rebutted the presumptions, and arbitrators have, consequently, reversed or substantially modified trustee determinations.[11]

MPPAA, too, expressly authorizes the federal district courts "to enforce, vacate, or modify the arbitrator's award," 29 U.S.C. § 1401(b)(2), thereby affording the parties to the dispute an additional layer of impartial review. While MPPAA requires that in any district court proceeding there shall be a presumption that the arbitrator's findings of fact are correct, 29 U.S.C. § 1401(c), the presumption is rebuttable and ERISA does not deprive the trial or appellate courts of any of their normal judi-

---

[11] *E.g., Hankin Transportation Personnel, Inc. and Teamsters 641 Pension Fund*, 14 Employee Benefits Cas. (BNA) 2852 (1991) (Pereles, Arb.); *Underground Construction Co. and Carpenters Pension Trust Fund for Northern California*, 14 Employee Benefits Cas. (BNA) 1543 (1991) (Twohey, Arb.); *Carnation Co. and Central States Pension Fund*, 9 Employee Benefits Cas. (BNA) 1409 (1988) (Nagle, Arb.); *PMTA-ILA Pension Fund and E.W. Coslett & Sons, Inc.*, 6 Employee Benefits Cas. (BNA) 2705 (1985) (Jaffee, Arb.); *Buy-Low, Inc. and Trustees, Food Workers Pension Fund*, 5 Employee Benefits Cas. (BNA) 2641 (1984) (Bowles, Arb.); *ITU Pension Plan and Ft. Worth Star Telegram*, 5 Employee Benefits Cas. (BNA) 1193 (1984) (Mittelman, Arb.); *Perkins Trucking Co. and Local 807 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1489 (1983) (O'Loughlin, Arb.); *Herman Segall, Inc. and ILGWU Retirement Fund*, 3 Employee Benefits Cas. (BNA) 2449 (1982) (Pillsbury, Arb.).

cial powers. *See Combs v. Classic Coal Corp.*, 931 F.2d 96, 100 (D.C. Cir. 1991) (holding that the existence of a statutory presumption does not preclude review); *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 90-93 (3d Cir. 1990) (affirming arbitrator's determination that employer had rebutted presumption of correctness of actuary's valuation of unfunded vested benefits); *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 730-33 (4th Cir. 1990) (rejecting trustees' argument that inquiry into reasonableness of an actuarial assumption cannot be undertaken if the same actuarial assumption "is reasonable for funding purposes").

This Court has consistently upheld statutory presumptions favoring one side of a dispute over the other. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), not only were certain rebuttable presumptions upheld in favor of coal miners seeking compensation for their suffering from black lung disease, but the Court ratified the constitutionality—on procedural due process grounds—of two irrebuttable presumptions. And, in *United States v. Gainey*, 380 U.S. 63 (1965), the Court upheld a statutory presumption that the mere presence of a defendant at the site of an illegal liquor still is deemed sufficient evidence to authorize conviction for certain felonies in connection with the operation of illegal distilleries.

In *Weinberg v. Salfi*, 422 U.S. 749 (1975), the Court upheld an irrebuttable statutory presumption that precluded surviving wives and stepchildren from receiving certain social security benefits based on a marriage relationship with a deceased wage earner, if the duration of the material relationship was for less than nine months. The Court in *Weinberger* stated that a prophylactic rule was acceptable, if there were a rational public policy underlying the congressional determination. In view of this Court's holding in such cases as these, there is simply no basis for finding that procedural due process is violated by the statutory presumptions in MPPAA. We

note, too, that presumptions are perforce given to non-neutral parties—whether the presumption is given to a railway employee's widow seeking recompense from the railroad (*Turnipseed*) or to the Social Security Administration seeking to minimize the amount of the public fisc that is payable to a widow (*Salfi*).

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The totality of the withdrawal liability assessment process from the initial determination by the plan trustees that a withdrawal has occurred, through the arbitral dispute resolution process to the final review by the federal courts, is rational, impartial, and fair. The rebuttable presumption of correctness, accorded the initial trustee and actuarial determinations, in no manner precludes any party to the dispute from a full hearing by neutral adjudicators, for the arbitrator and the courts are not deprived of any authority to reverse or modify the determination by the plan trustees or the plan actuary.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to affirm the decision of the court of appeals in this case.

Respectfully submitted,

GERALD M. FEDER
DAVID R. LEVIN *
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Suite 600
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

* Counsel of Record